

February 12, 2008

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David E. Hoffman

Date of Filing: December 11, 2007

Case Number: TFA-0232

On December 11, 2007, David E. Hoffman filed an Appeal from a determination that the Department of Energy's (DOE) National Nuclear Security Administration (NNSA) issued to him on October 23, 2007. In that determination, the NNSA responded to the request that Mr. Hoffman filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as DOE implemented in 10 C.F.R. Part 1004. The NNSA identified five documents responsive to Mr. Hoffman's request. However, the NNSA withheld all five in their entirety under 5 U.S.C. § 552(b)(5), known as Exemption 5. This Appeal, if granted, would require the NNSA to release the documents that it withheld from Mr. Hoffman.

I. Background

Mr. Hoffman submitted a FOIA request to DOE for documents regarding the Material Protection Control & Accounting program (MPC&A) with Russia and other former Soviet Union republics. DOE submitted the request to the NNSA, which found five responsive documents. They are:

- 1) MPC&A Talking Points for Ambassador Goodby.
- 2) NSC Meeting on MPC&A and SSD Delegation Membership dated, March 9, 1994.
- 3) Nunn-Lugar Budget Estimates for MPC&A Assistance to Russia, dated February 1, 1994.
- 4) Agreement between the Department of Defense of the United States of America and the Ministry of the Russian Federation for Atomic Energy concerning Control, Accounting and Physical Protection of Nuclear Material to promote the prevention of Nuclear Weapons Proliferation from the Federation, dated December 8, 1992.

- 5) Analysis of Ukrainian Requirements for U.S. Assistance of Material Control and Accounting and Physical Protection, dated August 11, 1992.

Determination Letter.

The NNSA withheld these documents in their entirety from Mr. Hoffman based on Exemption 5. The NNSA explained that Exemption 5 “protects those documents normally privileged in the civil discovery context, such as pre-decisional, deliberative process documents.” Lastly, the NNSA stated that despite Exemption 5, DOE regulations allow the NNSA to release documents to Mr. Hoffman when “disclosure is in the public interest.” The NNSA stated that disclosure to Mr. Hoffman is not in the public interest. *Id.*

Mr. Hoffman appealed the NNSA’s withholding of four of the five responsive documents to the Office of Hearings and Appeals (OHA). Appeal Letter. In particular, Mr. Hoffman did not appeal the withholding of Document #2. Mr. Hoffman stated brief reasons why releasing Documents #1, #3 and #5 is in the public interest. Mr. Hoffman also stated that because Document #3 is thirteen years old and Document #5 describes a “situation” fifteen years old, they cannot today be protected under Exemption 5. Lastly, Mr. Hoffman stated that Document #4 was improperly withheld under Exemption 5 because it “is not an internal document, but a formal agreement between the United States and another country.” *Id.*

II. Analysis

A. Exemption 5’s Deliberative Process Privilege

Exemption 5 protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency.” 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to “exempt those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*).

Included within the boundaries of Exemption 5 is the “predecisional” privilege, sometimes referred to as the “executive” or “deliberative process” privilege. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (*Coastal States*). The predecisional privilege permits the agency to withhold records that “reflect advisory opinions, recommendations and deliberations comprising part of the process by which government decisions and policies are formulated.” *Sears*, 421 U.S. at 150 (citation omitted). The privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, “reflect[ing] the give-and-take of the consultative process.” *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically “reflect the personal opinions of the writer rather than

the final policy of the agency.” *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

There are, however, exceptions to this general rule. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Montrose Chem. Corp. of California v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974); *Dudman Communications Corp. v. Dep't of the Air Force*, 815 F.2d 1565 (D.C. Cir. 1987). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 768, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

In addition to providing categories of records exempt from mandatory disclosure, the FOIA requires that, “Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

We have carefully reviewed the documents and find that the NNSA properly withheld them from Mr. Hoffman under Exemption 5. As a threshold matter, Mr. Hoffman argues that Exemption 5 does not apply to Document #4 because it is not a document addressed between two different agencies or between members of the same agency. We note that Document #4 is labeled “draft.” A single office necessarily reviews and considers a “draft” that it produces. Therefore, Document #4 is an “intra-agency” document within Exemption 5’s statutory definition.

The documents that the NNSA withheld from Mr. Hoffman are all similar in that they consist of the authors’ MPC&A opinions and recommendations, and factual material that the authors relied upon in forming those opinions and recommendations. The material is clearly predecisional, and deliberative in that it reflects the “give and take” of the decision-making process. With one exception, the factual information is either inextricably intertwined with the deliberative material, or was selected from a larger group of facts in an act that constituted the authors’ exercise of judgment. In either instance, revealing the factual material would in effect reveal the agency’s deliberative process.

That one exception is in Document #3, which appears to contain segregable information. In particular, the document consists of an issue statement, objectives, a summary of the existing MPC&A agreement, a section addressing expanded cooperation, and finally a funding profile for the existing and expanded cooperation. We believe that the issue statement, objectives, and summary of the existing MPC&A agreement may contain factual statements that are not agency deliberations and therefore the NNSA cannot withhold them from Mr. Hoffman under Exemption 5. Accordingly, we will remand for a determination on this issue. (By contrast, the remaining sections addressing expanded cooperation and the funding profile are deliberative –

they weigh various methods of achieving the program's objectives at three possible funding levels.)

Lastly, Mr. Hoffman argues that because Document #3 and #5 are more than a decade old, the FOIA cannot exempt them from disclosure. Since the FOIA does not set a timetable for when Exemption 5 expires, OHA declines to read one into it. In fact, one court interpreted Exemption 5 to have a "longer life" than other FOIA exemptions. *Africa Fund v. Mosbacher*, No. 92 CIV. 289 (JFK) (S.D.N.Y. May 26, 1993) (stating, "*Except* perhaps for FOIA Exemption 5, the above [FOIA] exemptions do not permanently preclude release of these documents to the public . . ." (emphasis added)).

B. Public Interest Determination

The fact that material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that, "To the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1. To determine if disclosure is in the public interest, OHA balances the benefit from disclosing the records with the "chilling effect" that disclosure "would have on the willingness of DOE employees to make open and honest recommendations on policy matters." *L. Daniel Glass*, 29 DOE ¶ 80,271 (Case No. TFA-0150) (October 16, 2006).

In the present case, we note that Mr. Hoffman claims that the MPC&A is one of the most successful and important non-proliferation programs of the post-Soviet era. Mr. Hoffman quotes Presidents George W. Bush, Bill Clinton, and George H. W. Bush, who all state that preventing the spread of nuclear, chemical, and biological materials is one of our highest national priorities. E-mail between David E. Hoffman and David M. Petrush, OHA, January 16, 2008. Thus, disclosing documents that illuminate the MPC&A may arguably allow the public to discuss and evaluate this historically important program.

Second, Mr. Hoffman shows that he is preparing a serious and comprehensive book to inform the public about the MPC&A, which Doubleday will publish in 2009. Mr. Hoffman's book is based on his work as a reporter for The Washington Post, which has included over 200 interviews with direct MPC&A participants and numerous site visits in Russia and Ukraine, from the 1990's through August 2007. He contends that to date, no book is supported by as much detail and research. *Id.*

Third, the fact that all of the documents were created a half generation ago may mitigate their potential chilling effect on future NNSA decision-making. The particular situations and decisions described in these documents are long past. Meanwhile, the fact that non-proliferation – and the attendant need for public information evaluating our government's historical efforts – continues to be vital to our national security, may tip our balance in favor of public disclosure.

In light of the above, we believe it is important to gain the NNSA's perspective on this matter. We will therefore remand this case for the NNSA to make a determination whether disclosing Documents #1, #3, #4, and #5 to Mr. Hoffman is in the public interest.

It Is Therefore Ordered That:

(1) The Appeal that David E. Hoffman filed on December 11, 2007, OHA Case No. TFA-0232, is remanded for the NNSA to make a determination whether releasing Documents #1, #3, #4, and #5 to Mr. Hoffman is in the public interest.

(2) If the NNSA determines that releasing Document #3 to Mr. Hoffman is not in the public interest, the NNSA shall issue a determination stating whether Document #3's issue statement, objectives, and summary contain segregable factual information.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 12, 2008